THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of RYAN G[redacted] by the SPARTA AREA School District Board of Education	DECISION AND ORDER 96/97-EX-22

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to sec. 120.13(1)(e), Wis. Stats., from the February 25, 1997 decision of the Sparta Area School District Board of Education to expel the above named 18 year old pupil from the Sparta Area School District for the remainder of the 1996-97 school year. This appeal was filed by the pupil's attorney and was received by the Department of Public Instruction on March 19, 1997.

In accordance with the provisions of sec. PI 1.04(5), Wis. Adm. Code, this Decision and Order is confined to a review of the record of the school board hearing. The State Superintendent's review authority is specified in sec. 120.13(1)(e), Wis. Stats. The State Superintendent's role is to ensure that the required statutory procedures were followed, that the school board's decision was based upon one or more of the established statutory grounds, and that the school board was satisfied that the interest of the school district demands that the student be expelled.

FINDINGS OF FACT

The record contains a first notice of expulsion hearing letter dated January 30, 1997 from the district administrator of the Sparta Area School District. The letter advised that a hearing would be held on February 10, 1997 which could result in the pupil's expulsion from the district. It was sent by District Administrator Marlin E. Phillips and indicated he had been appointed to act as hearing officer by the school board and he would conduct the hearing. The letter was sent separately to the pupil and his father by regular and certified mail. The letter did not invoke any of the six statutory grounds for expulsion but did allege that expulsion was being considered because the pupil possessed and distributed an illegal drug on school property. It did not indicate what the drug was or when the incident occurred. A copy of sec. 120.13(1)(e), Wis. Stats., was enclosed and referred to in the letter.

The record contains a second letter notice of hearing dated February 12, 1997, showing the hearing was rescheduled for cause by mutual agreement for February 20 and is otherwise virtually identical to the first notice. Minutes of the hearing officer expulsion hearing, an audio tape of the expulsion hearing and minutes of a subsequent school board meeting are also part of the record.

The hearing was held in open session at the pupil's request on February 20, 1997. The pupil and his father appeared at the hearing with counsel, Elizabeth Gleiss. Attorney Ralph E. Osborne, identified in the minutes as the "school's attorney" was also present and participated. At the hearing no witnesses were sworn. The school district administration presented its information mostly through statements of principal David Pera. The pupil and his father and their attorney were given the opportunity to question Mr. Pera, to make statements, offer what they

would, to discuss back and forth between the administrator, the attorney for the school district and Ryan's attorney.

Among other things the uncontested evidence showed the "Monroe County Police Department" was instrumental in placing a confidential police informant in the Sparta Area Senior High School posing as a student in January, 1997. There was reference to the fact that this individual, using the name David or DJ, was 19 years old and had a criminal record. During January this individual approached on different times and at different places, several high school students and asked to purchase drugs from them. The student's attorney sought to assert and argue entrapment of Ryan by this undercover agent. It was uncontested that on the first three times this undercover agent approached Ryan, Ryan refused the requests but that the fourth time, on January 7, Ryan agreed to obtain a small amount of marijuana the next day. Apparently three other students involved in drug issues by the undercover agent were not criminally charged with felonies and received shorter expulsions. [1] The hearing discussions focus on a felony criminal complaint dated February 19, 1997 which charges Ryan with delivering 1/8th once of marijuana to David on January 8. The district relied on the complaint. No one from the sheriff or police departments is identifiable on the hearing tape as being present. The undercover agent was not present. The second last paragraph of the complaint indicates the agent told the police that "the transaction took place in the parking lot of the Sparta Senior High School," and that David identified Ryan by referring to photos in the Sparta yearbook. The last paragraph of the complaint indicates when Ryan was confronted by the police, he agreed to waive his rights and gave a statement that agrees essentially with the version given by David, except that where the agent has

[1] The tape of this hearing is very faint and in some places, inaudible. It barely suffices for review. Districts must make an effort to see that an audible tape is provided.

the transfer of drugs occur in the school parking lot, Ryan told police then, and acknowledged at the hearing through his lawyer that the two drove off premises to Putman's Ridge where the exchange of marijuana for $25 took place. Ryan also stated to police he had done "this" a few times previously for friends who wanted some.

At the hearing and in his brief on appeal for the district, Attorney Osborne accepts Ryan's version that the negotiation took place on school property while the transfer of drugs for money occurred off grounds.

The evidence showed that since the day after receiving the notice of 15 day suspension he had withdrawn from Sparta school district and had been enrolled in Nekoosa High School where his mother lives.

At the conclusion of the hearing, after a brief recess, the administrator indicated verbally, on the record, he was expelling Ryan for the remainder of the school year and he could return for the 1997-98 school year after meeting with the building principal. After the hearing, the hearing examiner issued a letter dated February 24 expelling the pupil. The examiner's letter did not include the factual basis or grounds for the expulsion but referred to "the decision indicated to you." There was no finding that the interests of the school demand the student's expulsion. The record contains copies of this letter showing separate mailing to both Ryan and his father. The record also contains school board minutes dated the next day, February 25, upholding the examiner's action. There is no order for expulsion containing the findings of fact and conclusions of law.

DISCUSSION

School districts are limited purpose municipal corporations and have only such powers as are conferred specifically by statute or are necessarily implied therefrom. *Iverson v. Union Free High School District.*, 186 Wis. 342, 353, 202 N.W. 788 (1925). A school board's power to expel students derives from sec. 120.13(1)(e), Wis. Stats., which establishes certain categories of offenses which may be the basis for an expulsion and sets out specific procedures which must be followed in the expulsion process.

In reviewing an appeal of an expulsion decision, the Wisconsin Court of Appeals has stated that the scope of the State Superintendent's review is limited to that set out in sec. 120.13(1)(c), Wis. Stats. In *Racine Unified School District v. Thompson*, 107 Wis. 2d 657, 667, 321 N.W. 2d 334 (1982), the court of appeals *in dicta* stated: "The superintendent's review, then, would be one to insure that the school board followed the procedural mandates of subsection (c) concerning notice, right to counsel, etc." *Id.* In a related context, the court of appeals ruled this dictum has now become "embedded in Wisconsin school law." *Madison Metropolitan School District (Lenny G.) v. Wis. D.P.I.*, 199 Wis. 2d 1, 543 N.W. 2d 843 (1995). The department reads these directives as applying with equal force to the provisions in subsection (e). It is therefore incumbent upon the State Superintendent in reviewing an expulsion decision to ensure that the required statutory procedures were followed, that the school board's decision is based upon one of the established statutory grounds, and that the school board is satisfied that the interests of the school district demand the pupil's expulsion.

Because I find procedural error I am compelled to reverse the expulsion in this case. As indicated above, two notice of hearing letters were sent in this case. Each referred to the alleged violation as "possession and distribution of an illegal drug on school property." The drug is not identified, nor the date. But importantly, none of the six possible statutory grounds is cited. The expulsion statute provides in part:

120.13 School Board Powers.

> **(1) (c) 4.** Not less than 5 days' written notice of the hearing...shall be sent...The notice shall state all of the following:
> a. **The specific grounds under subd. 1., 2. or 2m** and the particulars of the alleged conduct upon which the expulsion proceeding is based. (Emphasis added.)

In *Benjamin L. v. Maple School District Board of Education,* Dec. and Order No. 214, Dec. 21, 1993, my predecessor stated in a case involving the bringing of marijuana and alcohol to school:

> Further, the statutory basis for the expulsion must be reflected in the notice of expulsion hearing, must be supported by evidence in the record, and must be reflected in the ultimate findings of the board. [Citing *John K. v. Wisconsin Rapids School District,* Decision and Order No. 178, May 17, 1991.]

In this case the major factual point of disagreement between the parties appeared to be whether the drug transfer occurred on or off school grounds. At two or three places on the tape, either the examiner or the school's attorney stated the location did not matter because the negotiating or arranging of the transaction occurred on school property. As indicated above, the district's brief accepted the pupil's version and the minutes reflect Mr. Osborne's suggestion that because negotiations took place on school property, that "was the reason for the expulsion." But that is a different statutory basis than the one charged, that is that the drug transfer occurred on school grounds.

In a case last year I upheld an expulsion based on a drug transfer occurring off school grounds where the notice charged an off grounds offense and also indicated, as the hearing notice also advised, that the health or safety of others at school was affected because those drugs were then brought to school and sold to another there. *Jason Q. v. Hartford Union High School District Board of Education,* Decision and No. 272, February 9, 1996. The notice provided in that case satisfied the above referenced statutory mandate. Here, there is no allegation that pupils' health and safety were endangered, the notice charged an on campus delivery where the proof was on campus negotiation and off campus delivery.

It has long been precedent in these cases that the notice requirements of the statute are mandatory in nature and that failure to comply with the statute's requirement renders the expulsion void. Thus even where a pupil unequivocally admits misconduct that is grounds for expulsion, the failure to provide the mandated, advance, statutory notice calls for reversal. See *Christopher K. v. West Allis School district,* Decision and Order No. 166, April 18, 1990; *Travis V. v. Waterloo School District,* Decision and Order No. 143, July 2, 1986. In *John K. v. Wisconsin Rapids School District,* Decision and Order No. 178, May 17, 1991, the pupil was charged with three separate grounds for expulsion where he had made a bomb threat before hours, from home, to the school. In part because the hearing notice failed to invoke the specific bomb threat ground for expulsion, the notice was found defective and the expulsion reversed. Here, absolutely no statutory ground for expulsion was cited in the notice; because the pupil is statutorily entitled to this notice, reversible procedural error has occurred.

Secondly, the district here sought to employ the independent hearing officer process available under sec. 120.13(1)(e), Stats. This process allows and requires the examiner to

determine expulsion is called for and enter the proper findings and orders. Here, the minutes state:

"Mr. Phillips decided to expel Ryan for the remainder of the school year Ryan may return to Sparta High School for the 1997-98 school year provided he has his parent(s)/legal guardian meet with the building principal beforehand.

The examiner's post hearing letters to the pupil and parent announcing the expulsion contain language virtually identical to this. The oral hearing decision, the minutes nor the letters indicate any findings of fact to support the expulsion. They do not recite whether the examiner found the violation to be negotiating a drug transfer or engaging in the transfer on or off grounds and if so, that this endangered the health, safety or welfare of pupils. It does not recite whether either of these possible actions was repeated violation of school rules or whether it was the transaction off school grounds that was relied on and still endangered the health and safety of students on school grounds. An examiner must make findings of fact connected up with the grounds on which expulsion is sought to support an order of expulsion. Most recently in *Clarence S. v. Bonduel School District Board of Education,* Decision and Order No. 320, April 10, 1997, in a case involving the possession of firearms in a pupil's car two days after hunting season in the parking lot on school property, I reversed the expulsion because even though the notice was proper, the board failed to make the necessary factual findings in its order that indeed the pupil did possess the firearms on school property, thus endangering the health and safety of pupils in violation of grounds stated in the expulsion statute:

> As discussed above, the record does not contain findings by the board regarding the grounds for expulsion, nor does it contain a finding that the intereests of the school demand expulsion. Each of these findings are required by law. The board may well have made these required findings, but I am unable to determine that they did so based on review of the record. Further, while a post hearing letter was sent to the pupil regarding

> the dates of expulsion, the record does not contain an order of expulsion sent to the pupil and his parent. Each of these omissions requires reversal. (Citations omitted).

Further, there is a required statutory finding that expulsion is necessary in the interest of the school district. Sec. 120.13(1)(e)2.,a. and (c)1. Stats.[2] None of these necessary findings were made in this case, which are made by the examiner, not the board, in a case under sub. (e) of the statute. As I said in *Douglas G. v. New London School District Board of Education,* Decision and Order No. 228, April 29, 1994:

> The record fails to indicate the board found the pupil guilty of the alleged misconduct, that the conduct meets a statutory standard for expulsion, and that the interests of the school demand expulsion. This also constitutes reversible error. See e.g. *Richard W. Jr. v. Central High School District of Westosha,* Decision and Order No. 122 (September 13, 1984); *Nicole P. v. Crandon School District*, Decision and Order No. 184 (February 7, 1992).

Thirdly, when the district record arrived for review at the department, it did not contain evidence of board action or "resolution, which is effective only during the school year in which it is adopted," authorizing the administrator to act as independent hearing officer. The district responded to a departmental inquiry by supplying two sets of board minutes showing approved motions for Mr. Phillips to so act. However, these are dated May 23 and May 28, 1996 and, by their terms, are not effective in the 1996-97 school year. The legislative history of this provision, laid out more fully below, makes it clear, whether because board membership changes over time or the legislature wanted closer board involvement if expulsion authority was to be delegated, the plain meaning of this provision is clear and must be observed. Failure to do so is procedural error.

[2] Sample forms for the hearing notice, findings of fact, conclusions and expulsion order are available from the department. Copies are enclosed with this decision.

Since it is necessary to reverse this case for the above reasons, and the case may be reheard in the district, I want to take this opportunity to comment on three further points brought up by this record. The first is whether the top school district administrator may ever act as an "independent hearing officer" in a case in the administrator's own district and if so whether there may be particular cases in which he or she ought not to so act. Because of the importance of this question I asked my legal staff to research the legislative history and summarize it here for districts' benefit.

The law first authorizing use of an independent hearing panel or officer was enacted in 1987 Act 88. The bill went through several important stages. The initial draft introduced February 10, 1987, contained provisions authorizing the school superintendent in Milwaukee to expel or to appoint a multiracial panel of 3 administrators to act. No administrator who "was involved in the incident" was permitted to participate as a panel member. Statewide, the school district administrator was specifically authorized to expel, as was a panel of more than one administrator designated by the school administrator. Likewise the same restrictive provision on administrators "involved in the incident" applied. Too, the original bill contained the above referenced limitation that the school board must pass a resolution approving the school superintendent or administrator to act but "only during the school year in which it is adopted." While, as is shown, the bill was otherwise substantially changed, this provision remained constant throughout.

On February 25, an assembly substitute amendment was introduced. For all districts statewide DPI was directed to maintain a list of qualified hearing officers "not otherwise employed or under contract to a school board" and to appoint from that list. The hearing officers

were authorized to expel. Apparently in recognition of the importance of the expulsion authority delegated, two other due process procedures not present in prior law when boards retained exclusive authority to expel, were made applicable in cases where hearing officers acted. They were that the examiner must maintain a "full" and "complete record" of the proceedings, and that a "transcript of the record" must be made available to the pupil upon request. Presumably the transcript would also be available to board members if they wished to use it in their required review of each expulsion ordered by an appointed panel or examiner.

The substitute amendment was amended in March in assembly amendment 2, to assembly substitute amendment 1, to AB 121. This amendment contained 3 alternative hearing models: a panel of 3 (multiracial in Milwaukee) school administrators appointed by the school superintendent or district administrator, a hearing officer appointed by DPI from its list or an *independent* hearing officer appointed by the board. Both in Milwaukee and statewide, no administrator could participate "if involved in the incident." However, assembly amendment 1 to this amendment made critical deletions: the panel of 3 appointed by the school administrator model was eliminated leaving only the other two hearing officer alternatives; and critically, the prohibition of participation by administrators who had been "involved in the incident" was retained for Milwaukee but deleted statewide. The record of the proceedings does not contain an explanation. One may speculate that there was a fear that smaller districts with fewer administrators would not be able frequently enough to employ this method if the proscription remained. With these changes, the bill was ordered engrossed and sent to the senate.

In the senate the change relevant to this discussion deleted the independent hearing officer appointed by DPI alternative and substituted an *independent* panel appointed by the local board.

Since the DPI appointed panel was removed, there remained no need for DPI to maintain its list of qualified hearing officers "not otherwise employed by or under contract to a school board" so that provision was also deleted.

One view of this legislative history may be read on its face to support district administrators acting as hearing officers, outside Milwaukee, perhaps even in cases in which he or she was involved in the incident leading to expulsion. The argument is that since the limitation as to involved incidents was removed, any reasonable rationale like administrative availability should be assumed. But there is another view perhaps more compelling. One line of rationale would be that the main reason the original draft's specific uses of district administrators as hearing officers was rejected is precisely because they were perceived as insufficiently independent. The word *independent* used to modify "hearing officer" first appeared in assembly amendment 2 to assembly substitute amendment 1 to the bill. It was used to describe only the one alternative of hearing officers appointed *by the board*. It may be argued such a word was not necessary for the other two approaches: a panel of 3 designated by the administrator with the proviso that none who were involved in the incident could be appointed (a type of independence), or a qualified hearing officer appointed by DPI from its list, also presumably "independent" of involvement. The argument goes that when the senate deleted the (independent) DPI alternative, and the restriction on involved administrators already being removed, it thought it necessary to borrow the "independent" language that had originally been made applicable to board appointed hearing officers, also applicable to any panel to be appointed by the board.

The *suspension* statute seeks to insure a degree of independence by requiring that the person conducting the post-suspension conference by the administrator or " his or her designee

who shall be someone other than a principal, administrator or teacher in the suspended pupil's school." Sec. 120.13(1)(b) Stats. This line of reasoning would attribute knowledge on the legislature's part of the constitutional importance of independence in examiners reflected in the case law in related areas. See *Morrissey v. Brewer*, 408 U.S. 471 (1972), final parole revocation examiner may be from the same agency charged with supervising and revoking parole, but must be "neutral and detached"; *Withrow v. Larkin, 421 U.S. 35 (1975)*, investigatory and adjudicatory functions may be accomplished within the same agency at times; *Guthrie v. WERC,* 111 Wis.2d 447, 331 N.W.2d 331 (1983), an advocate may not act subsequently as decision maker on the same matter; *Bracegirdle v. Board of Nursing,* 159 Wis.2d 402, 416, 464 N.W.2d 111 (App. 1990), in a professional licensing case, a licensed board member may be consulted in preliminary matters by the prosecutor as to the bringing of charges and also later participate in the decision on discipline of the licensee being investigated. If resort is made to dictionary definitions of "independence," the result suggests administrators should not be examiners: "...not affiliated with a larger controlling unit." Webster's Ninth New Collegiate Dictionary, 1988, p. 612.

In this case the attorney for the pupil argued that for the district to allow and/or actively participate in conducting undercover drug operations on school premises through persons with criminal records posing as students besides constituting entrapment in the fourth request to buy, violated the district's own policy:

> "...each student has the right to associate with students who are free from the influence of alcohol, tobacco and drugs, and not to be subjected to those wishing to buy, sell or use such substances."

During the discussions on this the administrator/examiner stated in part:

> "[It is] wrong to have drugs on school property - if you have to say No 100 times you should....My position is if it is something I can control I'm going to try to control it...I'm going to use whatever I can legally use - if that means undercover officers ...I'm not going

to do individual background checks on police officers, that's not my business...we have to trust the local sheriff..."

I agree wholeheartedly with the administrator. I believe most strongly in zero tolerance for drugs in and around schools. We must do everything we can within the law to rid ourselves of the scourge of drugs. But here it appears that the possible inconsistency of the use of undercover agents in schools with the board's policy on freedom from those who would offer to buy or sell drugs may be the administrator's own policy and practice thus raising the issue of his independence under the statute to act as examiner when that policy is in issue. No one briefed this issue and I do not find the examiner could not be independent. The policies may not be his. He may just strongly agree with them. If the board adopts policies recommended by the administrator, perhaps a court would find that supplies sufficient insulation from the accusation of insufficient independence. But since I have not previously reviewed a case in which the administrator purported to act as independent hearing examiner I wish to alert districts as to some of the complexities it raises. It may be that statutorily and constitutionally it will be found by the courts that a school administrator is sufficiently independent generally and in individual cases. But it may be wise for districts in the long run which can afford to use a retired school administrator, business manager, personnel director, pupil services director, teacher, private lawyer, volunteer retired judge, arbitrator or other qualified person with hearing examiner training whose independence is beyond question.

Secondly, at various points in the proceeding discussion focused upon the credibility of the pupil versus that of the undercover informant as expressed in the criminal complaint. There were references by the examiner to information referred to by the pupil's attorney about the informant as being hearsay and therefore uncertain. The record shows that the informant's information in

the criminal complaint is quadruple hearsay: the information about the negotiation and transaction moved from the unnamed informant, to officer Matson, to officer Trowbridge writing the complaint, to the principal to the examiner. The tape is very difficult to hear but it appears the examiner suggested an officer might be brought to testify. I will make two points. First, some hearsay is admissible in expulsion hearings, that of school staff and teachers, but not all hearsay, see *Racine Unified School District v. Thompson, supra* at 663, 664. The department has previously accepted police officer testimony as to certain hearsay. *Ramiro L. v. Westfield School District,* Decision and Order No. 217, January 31, 1994. But this agency has also suggested that great care is necessary in evaluating whether it should be received. *Antonio M. v. Kenosha Unified School District,* Decision and Order No. 176, April 18, 1991. Reliability remains the touchstone of admissibility of hearsay. Before a police informant's information is able to be considered reliable, it must reflect certain "indicia of reliability" which in a regular police case usually means the complaint recites that the informant has provided information in the past which has proven to be accurate and reliable. *Aguilar v. Texas,* 378 U.S. 108 (1964). While a looser standard may apply in a civil expulsion case, districts should be careful in such areas. *State ex rel. Thompson v. Riveland,* 109 Wis.2d 580, 326 N.W. 2d768, 770 (1982*), Alexander v. Silverman,* 356 F.Supp. 1179 (E.D. Wis. 1973). This complaint contains no information as to this informant's prior proven reliability. There is however general verbal reference to three pupils having expulsion hearings, apparently as a result of the work of the same informant. While not outcome determinative in this case, I wish to caution districts about reliance on multiple level hearsay from unnamed undercover informants, this one apparently with a felony conviction

record, and likely under duress to cooperate with police in obtaining evidence against others, absent information on prior reliability.

Additionally, along these same lines, in response to an inquiry the attorney general issued an opinion, OAG 5-94, March 28, 1994, suggesting school districts work out written agreements with local law enforcement on such topics as general access to school property and the questioning of minors in school without parental consent. An 11 page model Agreement Between Education and Law Enforcement Officials has been developed. Copies of both these documents are enclosed.

Lastly I want to urge districts, particularly those which may not have expelled many children in the recent past, to have their expulsion policies reviewed in depth by local school district counsel for close compliance with the procedural requirements. The Wisconsin Association of School Boards also keeps a school policy file which may be very useful for comparing other approaches. The Wisconsin School Attorney's Association has a digest of DPI's prior expulsion appeal decisions which includes a well developed outline of legal points. Expulsions are up over 300 percent in four years statewide. There have been several recent changes in the statutes. But also it appears other factors such as the imposition of revenue limits and the increased use of site based management are resulting in school boards placing the responsibility for processing expulsions at lower administrative levels. Where previously my staff indicates they received most of their expulsion process related phone calls from district's private lawyers, now I am advised more come from principals and assistant principals. It is not clear that these individuals are given as ready access to district local counsel.

It is most distasteful for me to have to reverse expulsions because of procedural error but the legislature has provided for this limited review function at the state level while leaving the broad expanse of substantive rule making and enforcement to local boards without state level review. This balance generally works and I will continue to do everything I can within the limits of the law to be supportive of strong discipline in the schools.

In reviewing the record in this case I find the school district did not comply with all of the procedural requisites. I am therefore required to reverse this expulsion.

CONCLUSIONS OF LAW

Based upon my review of the record in this case and the findings set out above, I conclude that the school board did not comply with all of the procedural requirements of sec. 120.13(1)(e), Wis. Stats.

ORDER

IT IS THEREFORE ORDERED that the expulsion of RYAN G[redacted] by the Sparta Area School District Board of Education is reversed.

Dated this 19th day of May 1997.

John T. Benson

John T.. Benson
State Superintendent of Public Instruction